84-1306

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CLERK

IN THE
SUPREME COURT OF UNITED STATES
October Term, 1984

No. _____

CHARLES B. BAKER, JR., Petitioner,

vs.

JOAN A. BAKER, Respondent

Petition For A Writ of Certiorari To The
Supreme Judicial Court Of The
State of Maine

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Counsel for Petitioner

January 18, 1985

QUESTION PRESENTED

Whether judicial inquiry into the adequacy of attempted service of process is constitutionally required before the authorization of service by publication?

LIST OF PARTIES.

Petitioner: Charles B. Baker, Jr. of LaJolla, County of San Diego and State of California

Respondent: Joan A. Baker of Washington Depot, County of Litchfield and State of Connecticut

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

No. _____

CHARLES B. BAKER, JR., Petitioner

vs.

JOAN A. BAKER, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT
OF THE STATE OF MAINE

The petitioner, Charles B. Baker, Jr., respectfully prays that a writ of certiorari issue to review the judgment

and opinion of the Supreme Judicial Court for the State of Maine entered in this proceeding on November 1, 1984.

OPINION BELOW

The opinion of the Supreme Judicial Court of the State of Maine, issued but not yet reported, appears in the Appendix hereto.

JURISDICTION

The Judgment of the Maine Supreme Judicial Court was entered on November 1, 1984. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257(3).

STATUTORY PROVISIONS INVOLVED

This case involves construction in a constitutional context of Maine District Civil Rule 4(g), which is set forth fully in the Appendix at Page 32.

STATEMENT OF THE CASE

Petitioner and Respondent were

divorced by order of the Ninth District Court, Division of Southern Cumberland, State of Maine dated September 21, 1973.

Respondent filed a Complaint for Enforcement of Decree of Court on July 6, 1982. The presiding Judge ordered service of process upon Petitioner by certified mail, return receipt requested and set a hearing date. On December 13, 1982, Respondent filed an Affidavit of Counsel with the Court stating that they had been unable to locate Petitioner at several addresses and requested ex parte that the Court allow service by mail to an attorney in California allegedly representing Petitioner in the matter of the probate of Petitioner's mother's estate, as well as by regular mail to Petitioner himself at an address given in the Court papers of his mother's estate. By order of Court dated December

17, 1982, the Court authorized this procedure. Counsel for Petitioner entered a special appearance and moved to dismiss the Complaint for inadequate service. As Maine District Court Rules of Civil Procedure 80(j) and 4(f) provide only for personal service in post-divorce motions, the motion was granted on February 10, 1983. Upon Respondent's oral motion, the Court ordered Service by Registered Mail upon the Petitioner at the address given in the probate papers of his mother's estate with a copy sent by regular mail to the California attorney supposedly representing him in that matter. The hearing was set for March 23, at which time Petitioner appeared specially and moved to dismiss based upon lack of jurisdiction because of inadequate service. This motion was again granted. Upon an oral motion for alternative service, without any showing

of a diligent effort to locate Petitioner, the Court set a new hearing date and ordered notice of hearing be sent to Petitioner by five simultaneous methods: certified mail, return receipt requested; regular mail with a request to forward, if necessary; ordinary mail to California counsel with a specific request to forward to Petitioner; and the Court also ordered notice by Publication and a diligent effort for service by hand. Maine District Court Rules of Civil Procedure 4(g) provides that service by publication may be utilized only upon Motion and showing that service with due diligence cannot be made by another prescribed method. On May 13, 1983 the same Court found that service was complete by finding that Respondent had complied with its order, despite the fact that there had been no attempt to personally serve the Petitioner prior to

the Order for alternative service, and without inquiry into the success of the other, unauthorized, means of service. Counsel for Petitioner again appeared specially and moved to dismiss based upon lack of personal jurisdiction due to constitutionally deficient service. The motion was denied and the hearing on the merits of the complaint scheduled. On May 18, 1983, counsel for Petitioner filed a Motion for Specific Findings of Fact and Conclusions of Law, which motion requested the Court to adduce findings of fact and conclusions of law with respect to the following questions:

1. In what manner the court found that Respondent had shown that service upon Petitioner could not with due diligence be made by any method other than by publication; and
2. Whether the Court found that

attempted service of process upon Petitioner pursuant to D.C.Civ.R. 4(f) was sufficient for a showing of due diligence on the part of the Respondent to serve Petitioner?

The Court's findings and conclusions were entered on May 26, 1983, and appear as Appendix at page 36.

The hearing on the merits of Respondent's motion was had on June 8, 1983. After hearing Respondent's oral testimony, and denying Petitioner's Motion to Dismiss for lack of personal jurisdiction, the Court entered an Order (Appendix at page 38) for alimony arrearages in a total amount of Fifteen Thousand Six Hundred Dollars ($15,600.00). The Court further ordered that the Petitioner provide evidence to the Respondent that a life insurance policy in the amount of One Hundred

Thousand Dollars ($100,000.00) was then maintained for the benefit of Repondent.

Petitioner timely appealed the District Court's decision to the Superior Court.

On December 14, 1983, the Superior Court heard Respondent's appeal from the June 8, 1983, Order of the District Court. The sole issue of law before the Court was the propriety of the District Court's grant of a motion for alternate service. Petitioner objected again on, inter alia, constitutional grounds. The Court denied Petitioner's appeal and awarded fees.

After entry of the Superior Court's Order, counsel for Petitioner filed a Motion for Specific Findings of Fact and Conclusions of Law, Motion for Relief from Order and Motion for Correction of tne Docket. These were denied.

Petitioner timely filed an appeal to the Supreme Judicial Court of the State of Maine.

Petitioner raised, inter alia, the issue of whether the Court had personal jurisdiction on the matter based upon the constitutional insufficiency of the service of process. Oral argument was held on September 11, 1984 and the decision rendered and docketed on November 1, 1984. This Petition was timely filed thereafter.

REASONS FOR GRANTING THE WRIT

I. Important Federal Question

The central issue in this case is whether or not the due process guarantees of the Fourteenth Amendment require judicial inquiry into the adequacy of attempted personal service before the authorization of service of process by publication. In the case at hand, Respondent first attempted to mail

process to the Petitioner, a method not allowed under the Maine Rules of Civil Procedure. The Court upon oral motion and without previously ordering service in hand, then ordered service by publication at the same time as other methods of service, and determined that service was complete upon notification that the execution of the methods chosen, including publication, had been accomplished, i.e., that the letters had been mailed, and process sent to a deputy for service. No inquiry was held into whether or not any of these methods of service other than publication had been successful.

This Court has long indicated that service of process by publication over non-residents is disfavored and in many cases constitutionally inadequate. Pennoyer v. Neff, 95 U.S. 714; Mullane v. Central Hanover Trust Company, 339

U.S. 306. Restatement (Second) of Conflict of Laws, Section 25 at 109. Service of process by publication is still frequently utilized, however, and its most frequent use is in the type of case where most citizens have their only contact with the judicial system; i.e., small actions concerning domestic relations, quiet enjoyment of property, termination of parental rights and probate. While the dollar amounts are usually small, the property or other rights involved are paramount to those concerned and this court has frequently reached out to protect them. Service of process in divorce is such an interest. Griffin v. Griffin, 327 U.S. 220.

Due process requires that notice be reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present

their objections. Milliken v. Meyer, 311 U.S. 457; Grannis v. Ordean, 234 U.S. 385.

There are circumstances where employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing a person's rights. Connlius v. Reading School District, 198 U.S. 458.

This Court, however, has not committed itself to the specific requirement of an inquiry into the circumstances of the case and the success, or likelihood of success, of personal service. Neither has it adopted any specific formula balancing the process requirements of notice and opportunity to be heard against the occasional need of expedience in order to allow persons to solve their problems and

go about their affairs. This requirement and this balancing, however, is implicit in Mullane v. Central Hanover Bank and Trust Company, supra, as well as other cases and has been recognized by the writers of the various State and Federal Procedural Rules. Maine Rules of Civil Procedure 4(g) requires this hearing, and the Advisory Committee, in their notes, cite Mullane and make clear, if not explicit, that a judicial inquiry is required into the prior attempts of service, and that service by publication is available only after a showing of the diligence to get service by another prescribed method more likely to give actual notice to the defendant. 1 Field, McKusick & Wroth, Maine Civil Practice, 95 (1970).

In the case at bar, the Court failed to require the Respondent to utilize personal service, the best

possible form of service, prior to authorizing service by publication. It is necessary for this Court to accept this case to announce with clarity the requirement for this inquiry and the standards by which the requirement of personal service can be forgone.

II. Failure to Require Personal Service Prior to Publication is not Harmless Error

The Supreme Judicial Court of the State of Maine, in addressing the District Court's failure to require personal service prior to authorization of service by publication, deemed this to be harmless error, noting that the Petitioner had actual notice. When notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to

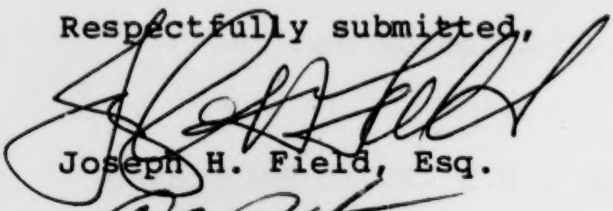
accomplish it. The reasonableness and hence the Constitutional validity of any chosen method must be defended as to its reasonableness. Compare Hess v. Pawlowski, 274 U.S. 352 with Wuchter v. Pizzutti, 276 U.S. 13. As publication is the least likely to satsify due process requirements, specific judicial inquiry must be made prior to its use. One measure of reasonableness is strict compliance with the Rules of Procedure. The District Court, after inquiry, may rightly decide that the facts of this case warrant service by publication upon the Petitioner. What is missing in this instant case, however, is this inquiry: the right of this Petitioner and of all similary situated defendants to the certainty that an independent body has determined that the best efforts of the Plaintiff at the best possible service have been exhausted before publication is

authorized. To deny this inquiry to the Petitioner is to authorize by oversight a process in which there are no strict safeguards to ensure the use of the best possible form of notice and which, by inaction, severly undercuts the due process guarantees of notice and hearing.

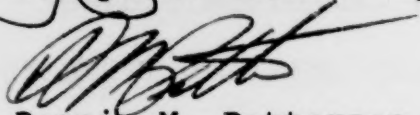
CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Judicial Court of the State of Maine.

Respectfully submitted,



Joseph H. Field, Esq.



Dennis M. Patterson, Esq.
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APPENDIX I

Reporter of Decisions

Decision No. 3642

Law Docket No. Cum-84-58

MAINE SUPREME JUDICIAL COURT

JOAN A. BAKER

v.

CHARLES B. BAKER, JR.

Argued September 11, 1984

Decided November 1, 1984

Before McKUSICK, C.J., and NICHOLS, VIOLETTE, WATHEN, GLASSMAN, and SCOLNIK, JJ.

GLASSMAN, J.

The defendant, Charles B. Baker, Jr., appeals from a judgment of the Superior Court, Cumberland County, affirming the judgment of the District Court and

awarding plaintiff attorney's fees. We affirm the judgment except as to the attorney's fees.

Joan Baker was divorced from her husband Charles Baker on September 21, 1973. The District Court judgment ordered the defendant, inter alia, to pay Joan Baker $1,200.00 a month as alimony, payable on the first day of each month until her death or remarriage; and to maintain $100,000 of life insurance on his life for her benefit so long as the defendant has outstanding alimony obligations to her with evidence provided to her annually of payment of the premiums.

On August 16, 1979, the defendant filed a motion for modication of the divorce judgment requesting termination of his alimony obligations. There followed a relatively extensive period of discovery. On June 1, 1982, the

defendant filed a notice of dismissal of his motion.

Joan Baker then filed a motion for enforcement of the judgment. The court allowed the plaintiff to amend her motion to include a prayer for past due installments of alimony and attorney's fees. The defendant secured a dismissal of the plaintiff's amended complaint for lack of personal jurisdiction of the defendant.

The plaintiff's later motion for enforcement of the divorce judgment was again ordered dismissed for want of personal jurisdiction, after hearing on March 25, 1983, of the defendant's motion to dismiss. Simultaneously, the court granted the plaintiff's oral motion for alternative service on the defendant of the plaintiff's refiled motion for enforcement and scheduled it for hearing. The court ordered that, if after a

diligent effort by the plaintiff personal service of the defendant could not be effected, the defendant could be served by publication of notice, by certified mail to the defendant's last known California address, and by ordinary mail to California counsel with a specific request that it be forwarded to the defendant. At the hearing, the defendant again moved to dismiss the plaintiff's motion for lack of jurisdiction of the defendant. The court entered its order finding that the plaintiff had complied with the March 25, 1983, order, denied the defendant's motion to dismiss, and set the plaintiff's motion for hearing on its merits. Following a June 21, 1983, hearing on the plaintiff's motion, the court entered a judgment for the plaintiff.

On appeal to the Superior Court, the defendant argued that the District

Court had erroneously granted the plaintiff's motion for alternative service of the plaintiff's post-judgment motion for enforcement of the divorce judgment. The Superior Court affirmed the judgment of the District Court and awarded the plaintiff' attorney's fees. The defendant appeals from this judgment.

The defendant concedes that his substantial rights were not affected, but argues that the District Court erred in permitting concurrent proof of due diligence in attempting to effect personal service and of publication of service upon the defendant. M.R. Civ. P. 80(j) governs service of process in post-

judgment divorce proceedings.1 The defendant asserts that service by publication is available only after compliance with the conditions of M.R. Civ. P. 4(g)(1), made applicable in the District Court by M.D.C. Civ. R. 4, which Rule 80(j) incorporates by reference.

M.R. Civ. P. 80(j)m made applicable in the District Court by M.D.C. Civ. R. 80, provides:

> Manner of Service on Divorce Motions. Any proceedings for modification or enforcement of the judgment in an action for divorce shall be on motion, a copy of which together with notice of hearing thereof shall be served in accordance with Rule 4, except that service within the state shall be by delivery to the party personally unless otherwise ordered by the court.

M.R. Civ. P. 4(g)(1) provides:

> The court, on motion upon a showing that service cannot with due diligence be made by another prescribed method, shall order service by publication in an action described in subdivision (f) of this rule, unless a statute provides another method of notice, or when the person to be served is one described in subdivision (e) of this rule.

The defendant maintains there is nothing in the record to show the plaintiff attempted with due diligence to serve the defendant personally prior to the District Court's March 25, 1983, order and, therefore, any method of alternative service was improper. Service by publication is in order, the defendant asserts,

> [O]nly upon failure after using diligence to get service by another prescribed method more likely to give actual notice to the Defendant, and then only upon Order of Court.

1 Field, McKusick & Wroth, Maine Civil Procedures at 95 (2d ed. 1970). We disagree.

In Elliot v. Elliot, 431 A.2d 55, 57 (Me. 1981), we held that a "post-judgment motion is not original process, and that a court has continuing jurisdiction over the parties to enforce any judgment entered against a defendant over whom personal jurisdiction has been obtained." We further explained that the requirements of Rule 80(j) are not jurisdictional, but procedural, designed to assure the non-moving party of actual notice of any pending motion. Id. Morever, we have noted the Rule's

underlying intent to avoid the practical problem unique to post-divorce judgment motions.

> Such motions are often brought several years after the judgment, and service upon the attorney of record in the original proceedings imposes an undue burden upon the attorney who may have long been out of touch with the party.

2 Field, McKusick & Wroth, supra, at 270. Rule 80(j) recognizes the possible inadequacy of service upon the original attorney of record to notify properly the affected parties. Most v. Most, 470 A.2d 250, 259 (Me. 1984).

The defendant's appeal addresses none of the concerns of Rule 80(j). The defendant does not allege the lack of actual notice or the impairment of any substantial right. Accordingly, we must view any procedural error in the District

Court order as harmless under M.D.C. Civ. R. 61.2 Farrell v. Theriault, 464 A.2d 188, 192 (Me. 1983).

M.D.C. Civ. R. 61 provides:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by and of the parties is ground for granting a new trial or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial of the parties.

Remanded to the Superior Court for remand to the District Court for further proceedings consistent

with the opinion herein.

All concurring.

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NOTICE: This opinion is subject to formal revision before publication in the Maine Reporter. Readers are requested to notify the Reporter of Decisions, Box 368, Portland, Me. 04112, of any typographical or other formal errors before the opinion goes to press.

Finally, the defendant objects to the award by the Superior Court of the plaintiff's counsel fees on appeal. We have noted before that motions for attorney's fees on appeal properly lie in the hearing court on remand. Prue v. Prue, 420 A.2d 257, 260 (Me. 1980). We agree that appropriate procedure here required the Superior Court to remand the case to the District Court for the purpose of entertaining the plaintiff's motion. I. Accordingly, we vacate

that portion of the judgment.

The entry is:

> Judgment affirmed except as to attorney's fees.
>
> Judgment awarding the plaintiff attorney's fees is vacated.

APPENDIX II

Maine District Court Civil Rules of Procedure 4(f):

(f) Service Outside State by Mail In Certain Actions. Where service cannot, with due diligence, be made personally within the state, service of the summons and complaint may be made upon a person who is subject to the jurisdiction of the courts of the state be delivery to him outside the state by registered or certified mail, with restricted delivery and return receipt requested, in the following cases:

(1) Where the pleading demands a judgment that the person to be served be excluded from a vested or contingent interest in or lien upon specific real or personal property within the state; or that such an interest or lien in favor of either party by enforced, regulated,

defined or limited; or otherwise affecting the title to any property; or

(2) Where the pleading demands a judgment for divorce or declaring a marriage a nullity.

Service by registered or certified mail shall be complete when the registered or certified mail is delivered and the return receipt signed or when acceptance is refused, provided that the plaintiff shall file with the court either the return receipt or, if acceptance was refused, an affidavit that upon notice of such refusal a copy of the summons and complaint was sent to the defendant by ordinary mail.

As amended Nov. 2, 1959, eff. Dec. 1, 1959; eff. Feb. 2, 1976; Aug. 7, 1981.

APPENDIX III

Maine District Court Civil Rules of Procedure 4(g)(l):

(g) Service by Publication.

(l) WHEN SERVICE MAY BE MADE. The court, on motion upon a showing that service cannot with due diligence be made by another prescribed method, shall order service by publication in an action described in subdivision (f) of this rule, unless a statute provides another method of notice, or when the person to be serviced is one described in subdivision (e) of this rule.

APPENDIX IV

Maine District Court Civil Rules of Procedure 80(j):

(j) Manner of service on Divorce Motions. Any proceedings for modification or enforcement of the judgment in an action for divorce shall be on motion, a copy of which together with notice of hearing thereof shall be served in accordance with Rule 4, except that service within the state shall be by delivery to the party personally unless otherwise ordered by the court. Added eff. Feb. 1, 1960; amended eff. Aug. 1, 1962; Nov. 15. 1976; July 21, 1877; Aug. 7, 1981.

APPENDIX V

STATE OF MAINE	DISTRICT COURT
Cumberland, ss.	District Nine
	Div. So. Cumberland
	Civil Action,
	Docket No. 996/72-73

JOAN A. BAKER,	*	
Plaintiff	*	
vs.	*	ORDER
CHARLES B. BAKER,	*	
Defendant	*	

It is found that the Plaintiff has complied with the Order of this Court, dated March 25, 1983, in service of process on Defendant. It is therefore Ordered that Defendant's Motion to Dismiss for lack of jurisdiction is DENIED.

It is further Ordered that a hearing be scheduled on the merits and

that Defendant be notified of this date by ordinary mail to the address set forth in the March 25th Order. In addition, Defendant's counsel Dennis Patterson, who appeared specially shall be notified of the hearing date by ordinary mail.

DATED: May 13, 1983

/s/ Harriet P. Henry

Harriet P. Henry

Judge, District Court

APPENDIX VI

STATE OF MAINE
Cumberland, ss.

DISTRICT COURT
District Nine
Div. So. Cumberland
Civil Action,
Docket No. 996/72-73

JOAN A. BAKER,
Plaintiff
vs.
CHARLES B. BAKER,
Defendant

SPECIFIC FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. In Response to Question one:

The Plaintiff has done everything the Court has Ordered her to do per Order dated May 13, 1983 which was proceeded by attempts to serve the Defendant by registered mail and to attempt to locate the Defendant through law offices in California, which had had correspondence

with Plaintiff's attorney in Maine;

2. In Response to Question Two:

Yes the Court finds that attempted service of process upon the Defendant pursuant to D.C. Civ. R. 4(f) is sufficient for a showing of due diligence on the part of Plaintiff to serve Defendant.

DATED: May 26, 1983

/s/ Harriet P. Henry

Harriet P. Henry

Judge, District Court

APPENDIX VII

STATE OF MAINE — DISTRICT COURT
Cumberland, ss. — District Nine
Div. So. Cumberland
Civil Action,
Docket No. 996/72-73

JOAN A. BAKER, *
Plaintiff *
vs. * ORDER
CHARLES B. BAKER, *
Defendant *

This matter came on for hearing on June 8, 1983, on Plaintiff's Motion for Enforcement of Decree of Alimony.

It is hereby Ordered that Plaintiff's Motion for Enforcement of Alimony is granted and

1. That judgment be entered for the Plaintiff for alimony

arrearages for the months of June, 1982, through June, 1983, in the amount of One Thousand Two Hundred Dollars ($1,200.00) per month, for a total amount due of Fifteen Thousand Six Hundred Dollars ($15,600.00), and that execution shall issue forthwith; and

2. That the Defendant be required to provide evidence to the Plaintiff that an insurance policy in the amount of One Hundred Thousand Dollars ($100,000.00) is currently maintained for the benefit of the Plaintiff, in accordance with paragraph one of the Settlement Agreement, approved and incorporated as part of the Divorce Judgment issued by this Court on September 21, 1973,

and that such evidence be provided to the Plaintiff within thirty (30) days of the date of this Order; and that

3. Evidence be provided to the Plaintiff on an annual basis beginning one year from thirty (30) days of the date of this Order.

DATED: June 21, 1983

/s/ Emanuelson, J.

Judge, District Court